SUPREME COURT, U.S.
FILED
NOV 29 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 465

FEDERAL TRADE COMMISSION

vs.

STANDARD OIL COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

WEYMOUTH KIRKLAND,
HOWARD ELLIS,
HAMMOND E. CHAFFETZ,
W. H. VAN OOSTERHOUT,
FREDERICK M. ROWE,
of
KIRKLAND, FLEMING, GREEN,
MARTIN & ELLIS,
Prudential Plaza,
Chicago 1, Illinois,
and
800 World Center Building,
Washington 6, D. C.,
Attorneys for Respondent.

THOMAS E. SUNDERLAND,
ALBERT E. GREEN,
910 S. Michigan Avenue,
Chicago 8, Illinois,
Of Counsel.

November 28, 1956.

INDEX.

	PAGE
Opinion Below	1
Question Presented	1
Statement	3
Reasons for Opposing Grant of the Writ	6
(1) The Government raises a hypothetical legal issue that was not adjudicated below	6
(2) The ruling below does not conflict with decisions of this Court	8
(3) The suggestion that the ruling below will govern other cases is baseless	12
Conclusion	14

CITATIONS.

Cases.

Corn Products Refining Co. v. Federal Trade Commission, 324 U. S. 726 (1945)	10
E. Edelmann & Co. v. Federal Trade Commission, Dkt. No. 11500 (7th Cir. pending)	13
Federal Trade Commission v. Cement Institute, 333 U. S. 683 (1948)	11
Federal Trade Commission v. A. E. Staley Mfg. Co., 324 U. S. 746 (1945)	9, 10, 11, 12
Labor Board v. American National Insurance Co., 343 U. S. 395 (1952)	8
Labor Board v. Pittsburgh S. S. Co., 340 U. S. 498 (1951)	8
C. E. Niehoff & Co. v. Federal Trade Commission, Dkt. No. 11526 (7th Cir. pending)	13

Henry Rosenfeld, Inc., 3 CCH Trade Reg. Rep., par. 26,068 (FTC July 2, 1956) 13

Universal Camera Corp. v. Labor Board, 340 U. S. 474 (1951) 7

Whitaker Cable Corp. v. Federal Trade Commission, Dkt. No. 11494 (7th Cir. pending) 13

Other Authorities.

Dirlam & Kahn, Fair Competition: The Law and Economics of Antitrust Policy, p. 122 (1954) 9

Kintner, The Revitalized Federal Trade Commission: A Two-Year Evaluation, 30 N. Y. U. L. Rev. 1143 (1955) 10

Levi, The Robinson-Patman Act—Is It in the Public Interest? ABA Antitrust Law Section Proceedings, p. 60 (Sept. 1952) 9

McGee, Price Discrimination and Competitive Effects: The Standard Oil of Indiana Case, 23 U. of Chi. L. Rev. 398 (1956) 12

Note, Functional Discounts Under the Robinson-Patman Act: The Standard Oil Litigation, 67 Harv. L. Rev. 294 (1953) 9, 12

Note, The Swinging Door—Or How to Obey One Antitrust Law by Violating Another, 59 Yale L. J. 158 (1949) 12

Shniderman, Federal Trade Commission Orders Under the Robinson-Patman Act, 65 Harv. L. Rev. 750 (1952) 9

Letter dated June 27, 1956 from the Acting Deputy Attorney General to the Chairman of the Senate Judiciary Committee, reprinted in Hearings Before the Antitrust Subcommittee of the House Judiciary Committee on Bills to Amend Section 2 of the Clayton Act, 84th Cong., 2d Sess., 688-89 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 465.

FEDERAL TRADE COMMISSION,

vs.

STANDARD OIL COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINION BELOW.

The opinion of the Court of Appeals, rendered on May 3, 1956, is reported at 233 F. 2d 649, and is reprinted in the Appendix of the petition for certiorari.

QUESTION PRESENTED.

In 1951 this Court reversed the Federal Trade Commission's previous contention that respondent's defense of "good faith" meeting of a competitor's equally low price under the Robinson-Patman Act was defeated by the Commission's finding of competitive "injury." The case was remanded for the entry of appropriate findings on respondent's "evidence tending to prove that its tank car

price was made to each 'jobber' in order to retain that 'jobber' as a customer and in good faith to meet a lawful and equally low price of a competitor." (R. 5311.)

On remand, a 3-2 decision of the Commission rejected respondent's "meeting competition" defense for lack of "good faith." "Good faith" was denied due to (1) respondent's alleged knowledge that its prices would cause competitive "injury"; (2) its inability to "cost-justify" these prices; and (3) the pricing "policy" or "method" pursuant to which it allegedly made the challenged price reductions to its four "jobber" customers in Detroit. (R. 5389.) This Commission's ruling was set aside by the Court of Appeals as unsupported legally and factually.

The Government here does not seriously contest the Court's reversal of the first two grounds of the FTC ruling against respondent. These elements in the Commission's decision were hardly defended by its counsel below, and are now relegated to a footnote in the Government's petition.[1]

Hence the question remaining is:

Whether the Court of Appeals correctly held that respondent's price reductions were granted as a defensive effort in individual competitive situations to hold four specified customers in the face of price raids by competitors, and therefore properly rejected the Commission's "afterthought" theory of a pricing "policy" or "method".

1. Pet. 10, note 5. The Commission's lengthy brief below devoted less than a page to defending these two propositions. See note 8, *infra*.

STATEMENT

This sixteen-year old proceeding is here for the second time on the issue of the validity of respondent's "meeting competition" defense.

The Commission's complaint filed on November 29, 1940, charged that respondent's price reductions to four gasoline customers in Detroit between 1936 and 1940 constituted discriminations violative of the Robinson-Patman Act. Respondent defended its lower prices on several grounds, including its statutory defense that they were granted in good faith to meet a competitor's lower price. The Trial Examiner who heard the evidence found in 1943 that respondent's price reductions were in each instance made to meet a competitor's equally low price for gasoline of like grade and quality, and with the sole purpose of holding its four customers who were being actively solicited by rival suppliers at equally low or lower prices. (R. 5096, 5104.)

The Commission in 1945 evidently conceded the factual sufficiency of respondent's "meeting competition" defense, but declined to enter findings thereon. In its view, "even though the lower prices in question may have been made by respondent in good faith to meet the lower prices of competitors, this does not constitute a defense" in the presence of competitive "injury" on the customer level. (R. 5179, quoted by this Court at R. 5311.) The Court of Appeals in 1949 found that "There is substantial evidence in this record, and we think it may be assumed to be conclusive, to the effect that [respondent] made its low price to Ned's, Citrin, Wayne and Stikeman in good faith to meet the lower price of a competitor." (R. 5294.) But it accepted the Commission's legal theory and held that respondent's prices were "properly condemned by the Commission's order, notwithstanding [respondent's] discrimi-

nation in price was made in good faith to meet competition of its own." (R. 5299-5300.)

In 1951 that interpretation was reversed by this Court, which construed the "meeting competition" defense as "absolute" irrespective of alleged competitive "injury." (R. 5320-21.) This Court's opinion observed that respondent "presented evidence tending to prove that its tank-car price was made to each 'jobber' in order to retain that 'jobber' as a customer and in good faith to meet a lawful and equally low price of a competitor" (R. 5311); and noted that "the trial examiner for the Commission in the instant case has found the necessary facts to sustain the seller's defense, and yet the Commission refuses, as a matter of law, to give them consideration." (R. 5315).[2] Accordingly, the case was remanded for entry of appropriate findings by the Commission.

Two years after the remand, a 3-2 majority of the Federal Trade Commission issued "modified" findings which again disapproved respondent's "meeting competition" defense. These findings acknowledged that "It may well be that respondent was convinced that if it ceased granting tank car prices to Citrin-Kolb, Wayne, and Stikeman and continued to refuse the tank-car price to Ned's Auto Supply Company it would lose these accounts." (R. 5388.) Yet they ruled out respondent's defense for lack of "good faith." The two minority Commissioners independently reviewed the record and, upholding the Trial Examiner, concluded that "The respondent's price reduction was made in good faith to meet a lawful equally low price of a competitor." (R. 5421, 5393.)

The Court of Appeals unanimously set aside the majority findings. As the Court viewed the record, the evi-

2. The Government fails to overcome (Pet. 8, note 3) the observation of the Court below (App. to Pet. 21) that the factual sufficiency of respondent's defense was assumed on all levels of the previous review.

dence showed that respondent "was confronted with the problem of reducing its price to meet competitive offers or of forfeiting the business of the four jobbers." (App. to Pet. 23.)[3] The Court stressed that "there is no finding, no contention and not even a suspicion but that the competing prices which petitioner met were lawful." (App. to Pet. 26.)

As for the first two grounds relied on by the Commission, the Court held that the Commission's renewed use of competitive "injury" to cut down respondent's defense was at odds with the prior decision of this Court, and that lack of cost justification—an alternative defense authorized by the Act—could not impair the "meeting competition" defense. (App. to Pet. 23-24.)

Finally, the Court rejected the Commission's theory that respondent's price reductions were granted pursuant to a preconceived discriminatory pricing method or system. The Court characterized this theory, which was advanced for the first time in 1953, as "an afterthought on the part of the Commission" (App. to Pet. 24) affirmatively contradicted by the evidence. The Court was "unable to discern any basis for the conclusion that [respondent's] prices 'were not the result of departures from a non-discriminatory price scale'." (App. to Pet. 26.) On the contrary, respondent "sold invariably at its uniform tank wagon price except when at different times it reduced its price to meet competitive offers in order to retain a customer." (*Ibid.*)

The Government at first publicly accepted the ruling below as a sound statement of law in accord with this Court's

---

3. The Court noted that "in the findings now under review the Commission does not expressly repudiate the findings of the Examiner in the original proceeding that petitioner's reduction in price was granted to meet the equally low prices offered by competitors." (App. to Pet. 22.)

1951 decision.[4] For reasons that are not apparent, there has now been a change of mind.

REASONS FOR OPPOSING GRANT OF THE WRIT.

(1) The Government Raises a Hypothetical Legal Issue That Was Not Adjudicated Below.

As framed by the Government, the issue is whether the meeting competition defense "can be used to justify a lower price regularly granted to certain large customers pursuant to a long established and inherently discriminatory pricing policy maintained by the seller and by major competitors." (Pet. 2.) This statement of the issue presupposes that the decision below held that the "meeting competition" defense could be so employed. But such was not the holding of the Court of Appeals. That Court never reached and did not adjudicate the issue of whether a "long established and inherently discriminatory pricing policy" could be justified. What the Court held was that the record affirmatively disproved any such "policy" or "system." The Government thus presents a purely hypothetical issue for this Court's review.

The Court's emphatic rejection of the "system" theory resulted from examination of the record. The Court was "unable to discern any basis for the conclusion that [respondent's] prices 'were not the result of departures from a non-discriminatory price scale.' The record affirmatively demonstrates to the contrary. [Respondent] sold invariably at its uniform tank-wagon price, except when at different times it reduced its price to meet competitive offers in order to retain a customer." Besides, in the Court's view, "The bargaining and haggling which took place between [respondent] and the four involved 'wholesalers' prior to a

---

4. See p. 13, *infra*.

reduction in prices to them is hardly consistent with the Commission's theory that prices were reduced pursuant to a system." (App. to Pet. 26.)[5]

In evaluating the record, the Court of Appeals concluded that the evidence contradicted the Commission majority's findings. The Court also accorded to the Trial Examiner's Report "such probative force as it intrinsically commands." *Universal Camera Corp. v. Labor Board*, 340 U. S. 474, 495 (1951). That Report, which in this Court's view had "found the necessary facts to sustain the seller's defense" (R. 5315), held that respondent's differentials to its four jobber customers "were granted to meet equally low prices offered by competitors" and hence were "lawful"—except for the "competitive injury" theory which this Court later repudiated. (R. 5104-05.) The two dissenting Commissioners agreed with the Examiner on the basis of an independent study of the "8,000 pages of evidence in this record."[6]

To reach the issue which petitioner here seeks to raise, this Court would first have to plow through a voluminous record and overturn the lower court's conclusion that the

5. The Court remarked that respondent "over many years refused to give Ned's, 'its most valuable tank-wagon customer'; any reduction at all despite persistent demands based upon competitive offers." (App. to Pet. 26-27.) The "reluctant grant of a ½¢ reduction to Ned's in 1936, increased to 1½¢ in 1938 in response to an 'ultimatum' by Ned's," appeared to the Court "to dispel completely any idea that such reduction in price was systematic, as urged by the Commission." (*Id.* at 27.)

6. In the view of one Commissioner, "the respondent, having lost two customers because it would not meet the prices of its competitors, made up its corporate mind to hang on to what business it had left, and in good faith and what appears to me only ordinary common sense, lowered its price to that of its competitors." (R. 5393.) According to the other dissenting Commissioner, "All in all, the record convinces me that the respondent—in meeting some competitors' prices and in refusing to meet the prices of others—acted as a reasonable prudent person would have acted under the circumstances." (R. 5420.)

pricing system theory was devoid of factual support. The Government's petition actually urges a *de novo* appraisal by this Court of the Commission majority's findings rather than a review of the correctness of the decision below which set them aside. (Pet. 9.)[7]

But this Court has consistently refused to undertake an evidentiary review of administrative findings. When agency rulings are set aside as unsupported, this Court will not duplicate the Court of Appeals' "conscientious consideration of the entire record." *Labor Board* v. *Pittsburgh S. S. Co.*, 340 U. S. 498, 503 (1951). This principle has been regarded as especially appropriate "where, as here, a statutory standard such as 'good faith' can have meaning only in its application to the particular facts of a particular case." *Labor Board* v. *American National Insurance Co.*, 343 U. S. 395, 410 (1952).

(2) The Ruling Below Does Not Conflict With Decisions of This Court.

The Commission's rejection of respondent's "meeting competition" defense in 1953, following the remand, rested

7. Petitioner even goes beyond the Commission majority's finding to draw support for its "system" theory from the answer filed by respondent to the original complaint. (See, *e.g.*, Pet. 4-5, 14-15.) But the averments of the answer (R. 14, 19) merely relate to respondent's policy of preferring to lose an account to a competitor rather than grant a tank car price to a customer who did not possess his own bulk storage and local delivery facilities, a minimum volume of business, and an adequate credit standing. Contrary to the Government's unsupported suggestions (Pet. 14-15), the record in no instance shows that respondent ever granted tank car prices *because* a customer met these requirements. Rather, respondent declined to reduce its prices even to hold a customer *unless* he met respondent's tests. The Court of Appeals thought that, consistent with the prior decision of this Court, "a seller must be permitted in the exercise of a sound judgment to determine when and under what circumstances it will reduce its price in order to meet that of a competitor, and a right to require that a purchaser be possessed of the facilities for storing, handling, and distributing the product." (App. to Pet. 27.)

primarily on two untenable grounds that were virtually abandoned before the Court below, and to which only a footnote is devoted in the petition for certiorari. (Pet. 10, note 5.)[8] The ground relied on here—the only one which the Court below said "has any semblance of merit" —is that respondent's pricing is barred by this Court's *Staley* decision, 324 U. S. 746 (1945).

Yet if the *Staley* ruling had any pertinence to this case, it is difficult to see why it was ignored by the Commission in its first disapproval of respondent's defense in 1945.

---

8. The propositions that a respondent's "good faith" is impaired by alleged competitive "injury" and failure to cost-justify are obviously indefensible. To impugn "good faith" by reason of competitive "injury" is to reassert the former FTC theory disapproved by this Court in 1951 as rendering the "meeting competition" defense "practically meaningless." (R. 5329.) And clearly, failure to "cost-justify" cannot nullify the alternative "meeting competition" defense.

Also, respondent obviously had no obligation to revise its pricing after the passage of the Robinson-Patman Act in 1936. (See Pet. 10, note 5.) Its uniform price to all Detroit customers except as reduced in four instances to hold an established account against rivals' lower price offerings complied with the Clayton Act both before and after the 1936 amendments.

9. (App. to Pet. 24.) The Commission majority's bias against the "meeting competition" defense as construed by this Court's 1951 decision has long been manifest. Almost simultaneously with its ruling against respondent, the same majority on March 16, 1953 advised Congress that "the present law, as interpreted by the majority decision of the Supreme Court in the Standard Oil of Indiana case (340 U. S. 231), is in the opinion of the Commission too weak to meet the problem to which the Robinson-Patman Amendment was originally addressed."

This FTC attitude toward the "meeting competition" defense has been criticized by numerous commentators. Dirlam & Kahn, *Fair Competition: The Law and Economics of Antitrust Policy*, p. 122 (1954) ["effort of the F.T.C. to emasculate this protective clause"]; Shniderman, *Federal Trade Commission Orders under the Robinson-Patman Act*, 65 Harv. L. Rev. 750, 752 (1952) ["considerable hostility"]; Note, *Functional Discounts Under the Robinson-Patman Act*, 67 Harv. L. Rev. 294, 298 (1953) ["unsympathetic attitude"]; Levi, *The Robinson-Patman Act—Is It in the Public Interest?*, ABA Antitrust Law Section Proceedings, pp. 60, 73 (Sept. 1952) ["notorious history"].

Then *Staley* was this Court's key and contemporaneous interpretation defining the scope of the "meeting competition" defense. The Commission would hardly have devised its novel "competitive injury" theory, later rejected by this Court, as making the "meeting competition" proviso "practically meaningless" (R. 5320), if *Staley* invalidated respondent's defense. The Court of Appeals aptly labeled the Government's "pricing system" theory "an afterthought on the part of the Commission, advanced in an attempt to bring the case within the rule of the [*Basing Point decisions*]." (App. to Pet. 24.)

The *Basing Point Cases* have simply no relevance to the situation at bar. In *Staley* and the companion *Corn Products* decision[10] this Court outlawed nationwide "basing point systems" which were designed to raise glucose prices artificially by ensuring that all producers quoted identical prices to customers at every point of delivery—either through "freight absorption" or "phantom freight". Staley's meeting competition defense was disapproved because Staley failed "to show, as the statute requires, the establishment of a 'lower price' made in good faith to meet the equally low price of a competitor." 324 U. S. at 756. Instead, "they maintained their prices at the level of their competitors' high prices, based upon the competitors' higher costs of delivery, by including phantom freight in their own delivered prices." *Id.* at 754.[11]

10. 324 U. S. 726 (1945).

11. The Government's umbrage at the statement of the Court below that the basing point systems served "to stabilize or increase but never to lower prices" (Pet. 13) is strange in view of this Court's quoted holding, as well as the recent analysis of *Staley* by the FTC's General Counsel: "In condemning a system which attached 'phantom freight' to certain sales, the Court held, positing the defense's availability in certain instances where prices were *lowered*, that it could not prevail in situations where prices had been *raised*." (Emphasis in original.) Kintner, *The Revitalized Federal Trade Commission: A Two-Year Evaluation*, 30 N. Y. U. L. Rev. 1143, 1165-66 (1955).

The *Basing Point Cases* thus did not concern the defensive effort of an individual seller to retain its customers by price reductions to cope with price raids of competitors. They condemned illegal pricing systems which produced artificial price uniformity and barred any competitive solicitation or customer shifts on account of price.[12] Indeed, when this case was here in 1951 the Court noted with reference to *Staley* that "In contrast to that factual situation, the trial examiner for the Commission in the instant case has found the necessary facts to sustain the seller's defense." (R. 5315.) And this Court read *Staley* as proceeding "upon the assumption, applicable here, that if a competitor's 'lower price' is a lawful individual price offered to any of the seller's customers, then the seller is protected, under § 2(b), in making a counteroffer provided the seller proves that its counteroffer is made to meet in good faith its competitor's equally low price." (*Ibid.*)

The Court of Appeals accurately perceived the difference between the *Basing Point Cases* and the situation at bar. It remarked that "The gist of the reasoning of the Supreme Court in those cases was that the pricing system being illegal all prices determined thereby were illegal. It follows, according to such reasoning, that the meeting by the seller of a competitor's unlawful price precludes the seller from reliance upon a 'good faith' defense." (App. to Pet. 25-26.) And the Court emphasized that "in the instant situation there is no finding, no contention and not even a suspicion but that the competing prices which

12. As characterized by the Court in the *Cement Institute* case, the most recent of its *Basing Point* decisions, the system was a "handy instrument to bring about elimination of any kind of price competition," and resulted in cement being sold "in every given locality at identical prices and terms by all producers." 333 U. S. 683, 713 (1948).

petitioner met were lawful." (*Id.* at 26.)[13] Rather than conflicting with *Staley*, as petitioner urges, the decision below implemented *Staley* in every respect.

(3) The Suggestion That the Ruling Below Will Govern Other Cases Is Baseless.

No basis exists for the Government's assertion that review of this case "will have a controlling effect on pending litigation involving other industries." (Pet. 17.) Three FTC rulings rejecting "meeting competition" defenses for discriminatory discount systems—not the meeting of individual competitive offers as here—are presently under re-

---

13. Petitioner's insinuations concerning "parallel pricing systems" which respondent's competitors might defend as meeting respondent's prices are gratuitous and speculative. (Pet. 16.) The Commission's ruling adverted to pending proceedings instituted against three of respondent's competitors, but did not find that the prices quoted to respondent's customers by these three or numerous other competitors were unlawful or that respondent had any reason so to believe. (R. 5389-90.) Whether these three competitors would assert or could successfully invoke the "meeting competition" defense is wholly conjectural. Moreover, any *Staley*-type industry-wide pricing system is refuted by respondent's loss of valuable customers to two of these competitors as well as the active price solicitation and capture of its customers by numerous other gasoline suppliers. (*E.g.*, R. 1912-16, 489-90, 560-61, 2079, 5100-04.) Respondent's share of the Detroit market during the relevant years shrank substantially. (R. 5061.)

Petitioner's effort to taint respondent's pricing with such sinister nouns as "dual price formula" (*e.g.*, Pet. 14) as well as its allusions to potential attempts by respondent "to manipulate its overall price scale upward" which "the consuming public will have to subsidize" (Pet. 14), are unworthy and destitute of a single record reference. Each is belied by scholarly studies of the Detroit gasoline marketing background of these proceedings. See Note, *Functional Discounts under the Robinson-Patman Act: The Standard Oil Litigation*, 67 Harv. L. Rev. 294, 312-17 (1953); and esp. *id.* at 315 n. 91; McGee, *Price Discrimination and Competitive Effects: The Standard Oil of Indiana Case*, 23 U. of Chi. L. Rev. 398, 462-66 (1956). Cf. Note, *The Swinging Door—Or How to Obey One Antitrust Law by Violating Another*, 59 Yale L. J. 158 (1949).

view by the Court of Appeals that rendered the decision below. Despite the Government's professed fears, not one of those petitioners either in briefs or oral argument has urged or even cited the ruling in the instant case.[14]

The reason is obvious: The decision below does not control the legality of discriminatory "pricing systems," but is predicated on the facts of this case which show defensive price reductions to individual customers quoted to meet competitors' lower offers.

The Government itself so analyzed the ruling below prior to petitioning for certiorari. According to the Department of Justice last June, that decision did "not broaden the scope or adversely affect what we consider to be the merits of a section 2(b) defense"; and "pricing differences may, we emphasize, be justified under existing law only in response to individual competitive situations and may not be extended beyond what is necessary to meet good faith offers of competitors."[15] Furthermore, a unanimous Federal Trade Commission in July approved a trial examiner's ruling because it "correctly held that respondents had failed to make out a defense of meeting competition in good faith through their practices of meeting competition generally rather than specifically, meeting a practice rather than a price, aggressive rather than defensive merchandising methods."[16]

---

14. *E. Edelmann & Co.* v. *Federal Trade Commission*, Dkt. No. 11500 (7th Cir. pending); *Whitaker Cable Corp.* v. *Federal Trade Commission* Dkt. No. 11494 (7th Cir. pending); *C. E. Nichoff & Co.* v. *Federal Trade Commission*, Dkt. No. 11526 (7th Cir. pending).

15. Letter dated June 27, 1956 from the Acting Deputy Attorney General to the Chairman of the Senate Judiciary Committee; reprinted in *Hearings Before the Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee on Bills to Amend Section 2 of the Clayton Act*, 84th Cong., 2d Sess. 688-89.

16. *Henry Rosenfeld, Inc.*, 3 CCH Trade Reg. Rep., par. 26,068 at p. 35,926 (FTC July 2, 1956). That decision also held the defense unavailable on other statutory grounds.

CONCLUSION.

The decision below is clearly correct and fully supported by a bulky record which covers transactions dating back two decades. Its holding turns on the facts of the instant case and generates no legal principles of wider application capable of influencing other proceedings involving different situations.

For the above reasons, respondent respectfully submits that the petition for writ of certiorari should be denied.

WEYMOUTH KIRKLAND,
HOWARD ELLIS,
HAMMOND E. CHAFFETZ,
W. H. VAN OOSTERHOUT,
FREDERICK M. ROWE,
of
KIRKLAND, FLEMING, GREEN,
MARTIN & ELLIS,
Prudential Plaza,
Chicago 1, Illinois,
and
800 World Center Building,
Washington 6, D. C.,
Attorneys for Respondent.

THOMAS E. SUNDERLAND,
ALBERT E. GREEN,
910 S. Michigan Avenue,
Chicago 8, Illinois,
Of Counsel.

November 28, 1956.